LAW AND LOGIC.

IT appears that the logicians themselves are not agreed in their definition of logic.[1] But most of us laymen, when we think of logic, think of the syllogism — a process of reasoning by which, from certain general propositions which are assumed, we reach an irresistible conclusion.

For example: —

All men are mortal.
All kings are men.
Therefore all kings are mortal.

When Chief Justice Holmes condemns as fallacious "the notion that the only force at work in the development of the law is logic," [2] he calls sharp attention to the fact that judicial conclusions do not flow irresistibly from certain established general propositions, that the problems with which lawyers and judges have to deal are not susceptible of a mathematical solution. To hold that logic can answer the questions which judges are compelled to answer is giving to this tool of the reasoning faculty a power which its makers never claimed for it, and here lies, as it seems to me, the chief trouble with Professor Thayer's distinction between law and logic as indicated in the following sentence: "Admissibility is determined, first, by relevancy, — an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence, which declares whether any given matter which is logically probative is excluded." [3]

We get a little closer to his meaning if we examine a case which he cites as one of a great number of cases which "involve no point at all in the law of evidence." [4] Richardson sued the railway for damages caused by its negligence in failing to prevent the spread of fire from its property to the plaintiff's adjoining property, and he contended especially that the railway ought to have kept a watchman at a certain place on its line. The defendant offered to show that it was not the practice of other

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[1] Mill's System of Logic, 1.

[2] "The Path of the Law," 10 HARVARD LAW REVIEW, 465.

[3] Preliminary Treatise on Evidence, 269.

[4] Grand Trunk Railway *v.* Richardson, 91 U. S. 469.

railways to employ watchmen in like cases. The court, after defining negligence as the failure to exercise the caution and diligence which prudent men ordinarily exercise, held that the evidence offered was irrelevant.

On what ground is this case banished from the domain of law? Because the court has excluded evidence which the author considers logically irrelevant. If the author had considered the evidence to be relevant, then, if I understand him aright, the decision would have become a part of the law of evidence, for "the law determines as among probative matters, matters in their nature evidential, — what classes of things shall not be received" (p. 264). It appears, then, that when the court decides that a matter which is logically relevant is admissible, or that a matter which is logically irrelevant is inadmissible, it is deciding no point of law, and that the law of evidence begins only when the courts either unconsciously or purposely violate the rules of logic concerning the relevancy of evidence.

Any successful effort to drive out of the field of evidence a large number of the cases which we find there would be greeted by most of us with enthusiasm. It might enable us to grapple with the cases which were left with greater courage. But this effort, as it seems to me, is bound to fail, simply because logic furnishes no test of relevancy; and unless we permit the law to decide that question for us, it is not going to be decided at all.

Let us see, for example, how far logic would help us to answer a question suggested by John Stuart Mill in his chapter on "Approximate Generalizations:" "A hearsay of a hearsay is worthless at a very few removes from the first stage." [1] It is to be noticed that this great logician does not venture to say at just what stage hearsay becomes worthless; and if we put to ourselves that question, if we consider for a moment how many impossible assumptions we must make in order to supply a basis for mathematical calculation, we shall see how far removed we are from the field of exact knowledge. Let us suppose that the statement of a witness has a probative value when it is a little more likely to be true than false. If we assume, then, that all men are equally truthful and have equally good memories, and if we assume further that they are equally truthful under all circumstances, whether they are under a special temptation to lie or not, and if we assume further that every man will tell the truth in seven cases out of ten, it follows

[1] Mill's System of Logic, ch. 23, sec. 6.

mathematically that the statement of a witness on the stand of what some other person said to him ought not to be received as evidence of the fact stated. $\frac{7}{10}$ of $\frac{7}{10} = \frac{49}{100}$. There is little less than an even chance that in such case we are getting the truth. Another illustration of our distance from the field of logical certainty is suggested by the author's criticism of a recent decision of the Supreme Court of the United States.[1]

He refers to this decision as "a neat illustration of a common error," and after summarizing the statute of Virginia under consideration in that case he proceeds: "That is a statutory regulation of the responsibility of carriers; and yet, strangely, it is declared to be too plain for anything but statement that it is a rule of evidence. Perhaps this exposition may be accounted for by the fact that the learned and able judge who gives it was trained in the practice of Louisiana, where common law rules and principles are much modified or displaced."

Here we find that in the opinion of the Supreme Court the proposition that a certain statute is a rule of evidence is too clear for argument. In the opinion of the learned author, the proposition that the statute is not a rule of evidence is too clear for argument. All these ten gentlemen are trained thinkers. They have all studied logic. They have all studied mathematics. They will all agree that the angles of a triangle are equal to two right angles, and they will all agree that the whole is greater than any of its parts. The fact that they do not agree upon the question whether a given statute is a rule of evidence points irresistibly to the conclusion that law is not an exact science.

The last sentence in the criticism above quoted brings us back to the question of logical relevancy. When the author finds that the Supreme Court has erred, he looks for the cause of this error, and he suggests as a cause the fact that Judge White, who wrote the opinion in which all the judges concurred, comes from Louisiana. Other lawyers, I fancy, would say that this fact was irrelevant. But how shall the question of its relevancy be determined? Certainly there is no rule of logic that will help us, and I am utterly at a loss to see how the question is to be authoritatively determined except by the judgment of a court. Indeed, it is because men of intelligence and experience differ upon the question whether a given matter is relevant that they have to apply to the court to settle the dispute. And the judgment of the court,

[1] Richmond Railroad Co. *v.* Tobacco Co., 169 U. S. 311.

when rendered, has the same value in this branch of the law that it has in any other branch. It settles the particular dispute not for that time only but for the future, and it settles a dispute which cannot be settled in any other way.

If you ask a lawyer whether he really believes that judicial decisions are mathematical conclusions, he will say that the notion is absurd; that when four judges vote one way and three another, it does not mean that the three or the four have made a mistake in addition or subtraction. It means simply that the different judges have given different weights to divers competing considerations which cannot be balanced on any measured scale. One judge, for example, may have greater faith in the honesty of witnesses than another judge, and be disposed to let in hearsay which another judge would exclude. The census of liars has not yet been taken, and it is just as inevitable that two different judges, when left free to act, should come to different conclusions concerning the value of hearsay, as that one man should be an Episcopalian and another a Baptist.

But while we are all ready to admit, when brought to book, that the law is not an exact science, we are constantly assuming the contrary. A lawyer, for example, who is deeply grieved by an adverse decision, will say, "I thought that I knew the law," implying that the present state of the law is the only question involved in the new judgment. This misconception as to the scope of the judicial process seems to be based upon a similar misconception as to the origin and scope of the law, a misconception sufficiently indicated in the familiar maxim, "It is the duty of the courts to apply the law and not to make it." This proposition assumes that the law is to be applied to the case in hand much as a yardstick is applied to a piece of cloth. Two careful men using the same yardstick are bound to reach the same result.

This REVIEW has already permitted me to state my reasons for believing that what we call the common law springs from our decided cases.[1] You may say, if you please, with James C. Carter, that our law "consists of rules springing from the social standard of justice," and you may say with equal truth that our statutes spring from the average wisdom of the community. All this is very proper talk for the evolutionist and the philosopher, but unless you are going to lose yourself in the fog of predestination,

[1] Vol. 12, p. 545.

you must assume that men are free agents, except as they are visibly controlled by other men. Environment may be getting in its perfect work on our legislators, but no man knows, until the session ends, what sort of a blue book Environment will bring forth. We assume, therefore, that our legislators behave pretty much as they please, and are responsible for their acts.

Now in precisely the same sense in which our statute law is made by the legislator, that which we call the common law is made by the judge. And in making that law he does not usurp any power which does not belong to him, for, as Bentham aptly says, a judgment which is used as a precedent "has the effect of a real law." To say, therefore, that the judge makes the law, is simply to say that he renders a judgment which becomes a precedent.

But the principle which gives to judgments the effect of law requires merely that an adjudged case which cannot be distinguished on any rational ground shall be followed. Beyond this the judge has a free hand to decide the case before him according to his view of the general good. It may be that his decision will be governed by "the social standard of justice," but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered. It is this element of uncertainty which gives to every new judgment the force of a new rule. Without this the law would be as fixed as the law of gravitation. It is this element of uncertainty, too, which makes the practice of the law a highly intellectual pursuit. An eclipse of the sun can be predicted with such ease and certainty that the astronomer turns the calculations over to his office boy. That is not the sort of work in which judges and lawyers are engaged.

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